RECORD AND BRIEFS

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In the Supreme Court of the United States

ENDREW F., A MINOR,
BY AND THROUGH HIS PARENTS AND NEXT
FRIENDS, JOSEPH F. AND JENNIFER F.,
Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* COLORADO STATE BOARD OF EDUCATION AND COLORADO DEPARTMENT OF EDUCATION IN SUPPORT OF THE RESPONDENT

CYNTHIA H. COFFMAN
Attorney General

FREDERICK R. YARGER
Solicitor General
Counsel of Record

GLENN E. ROPER
Deputy Solicitor General

JULIE C. TOLLESON
First Assistant Attorney General

Office of the Colorado Attorney General
1300 Broadway
10th Floor
Denver, Colorado 80203
Fred.Yarger@coag.gov
(720) 508-6186

Counsel for Amici Curiae Colorado State Board of Education and Colorado Department of Education

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*?

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INTEREST OF *AMICI CURIAE*

The Colorado State Board of Education is an elected body entrusted with the general supervision of Colorado's public schools pursuant to the State Constitution. COLO. CONST. Art. IX § 1(1). As part of its responsibilities, the Board creates statewide education policy, including by crafting rules for administering state special education programs. It is governed in part by Colorado's Exceptional Children's Educational Act, COLO. REV. STAT. §§ 22-20-101 to -206, and its accompanying rules, which both incorporate by reference and expand upon the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–82, and its implementing regulations. *See* 1 COLO. CODE REGS. § 301-8. The state rules also define the term Free Appropriate Public Education (FAPE) and specify IDEA-aligned requirements for the development and revision of Individualized Education Programs (IEPs). *Id.* § 301-8(2.19) & (4.03). Colorado special education law also includes requirements beyond those of IDEA.[1]

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[1] For example, Colorado requires that: 1) IEPs specify whether the child will achieve district, local, or charter school institute standards, or instead achieve individualized standards, COLO. REV. STAT. §22-20-108(4); 2) for a child who is visually impaired, the IEP team must consider specified factors and adopt a literacy modality plan, *id.* §22-20-108(4.5)(a); 3) for a child who is deaf, the IEP team must consider specified factors and address the child's communication needs, *id.* §22-20-108(4.7); 4) the IEP requirement for transition services begins when the child either is 15 years old or completes ninth grade, 1 COLO. CODE REGS. § 301-8(4.03)(6)(d)(i); and 5) the special education director or designee is not only a required IEP team member, but may not be excused from participation. *Id.* § 301-8(4.03)(5)(b).

The Colorado Department of Education is the state agency responsible for implementing state K-12 education efforts. *See generally* COLO. REV. STAT. § 24-14-115 (creating the Department); *id.* §§ 22-1-101 to 22-96-105 (Colorado Education Code). The Department operates under the leadership of the Board-appointed Commissioner of Education and serves as the State Educational Agency (SEA), as defined by 34 C.F.R. § 300.41, responsible for administering federally funded education programs in Colorado.

The Department's administration of IDEA has three main elements. First, the Department's Office of Special Education oversees statewide IDEA compliance. Its staff provides technical assistance to districts and charter schools, conducts professional development for teachers, and maintains a public website with information and resources for both families and educators.

Second, the Department handles disputes and complaints under IDEA. Through the Department's dispute resolution program, trained mediators facilitate meetings between schools and families with disabled children. The Department also has a complaints process as required under IDEA rules, 34 C.F.R. § 300.151.[2] Any organization or individual alleging a violation of IDEA Part B may file a complaint with the Department. State Complaints Officers—all of whom are licensed attorneys—review these complaints, conduct investigations as needed,

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[2] The Department's *State Level Complaint Procedures* were most recently revised in 2010 and are available at http://tinyurl.com/hp4ze9g.

and issue written decisions. If a school has substantially failed to comply with IDEA, the State Complaints Officer may direct remedial action and award appropriate remedies. 34 C.F.R. § 300.151(b).

Third, parents and school districts may request a due process hearing conducted by a Department administrative law judge. In a due process hearing, the parties present evidence and legal arguments, and the ALJ issues findings of fact and conclusions of law and may order remedies for any violations of IDEA. 34 C.F.R. § 300.511–515. Parties aggrieved by the decision of an ALJ may then challenge that decision by bringing a civil action in state or federal court. 34 C.F.R. § 300.516.

Given their responsibilities under both IDEA and Colorado law, the Board and the Department have a keen interest in the standard that courts use in evaluating the sufficiency of an IEP under the IDEA. *Amici* take seriously their central role in the federally funded, state-designed system of data-driven accountability and continuous school improvement. But that system should not be invoked to create a new standard for IEP development divorced from any language in the IDEA.

STATEMENT

This case involves two distinct yet interrelated legal frameworks for which the *amici* bear fiscal and administrative responsibility: the IDEA and the Elementary and Secondary Education Act (ESEA), 20 U.S.C. §§ 6301–7974. Both the IDEA and the ESEA are Spending Clause statutes. That is, in exchange for federal funds, the Department takes on supervision and oversight roles under terms specified by law. *See, e.g.*, 20 U.S.C. § 7842 (requirements regarding state and local plans and applications).

Both statutes have an important place in the legal architecture of public education, but they should not be conflated. At the heart of IDEA is the IEP: specialized educational programming designed to meet an individual student's needs. *See Honig v. Doe*, 484 U.S. 305, 310–11 (1988). In contrast, ESEA establishes a system for school accountability and improvement that seeks to raise the bar for all student groups. These two prongs of federal education policy are complementary: the IEP requirement ensures that schools meet the individualized needs of students with disabilities, while the school accountability system helps States provide targeted support to schools and districts on a data-driven basis. Petitioner blurs the line between these two distinct statutes by suggesting that amendments to ESEA altered the judicial review standard for individual FAPE claims under IDEA. Pet. Br. 28.

Background and evolution of the ESEA. The ESEA was signed into law in 1965 and is at the center of federal education policy. It is a funding statute that has been repeatedly reauthorized by Congress, sometimes with sweeping amendments. Over the years,

ESEA has evolved beyond its original emphasis on low-income students and communities into a roadmap for state-driven school improvement.

To receive federal funding under ESEA, States must craft and submit a Plan. 20 U.S.C. § 6311. Among other things, the State Plan allows for both data-driven school-by-school ratings and a demographic analysis of student performance based on a statewide assessment. Each State Plan must ensure that a number of different subgroups—including traditionally overlooked students such as racial minorities, special education students, English-language learners, and low-income populations—are making academic progress. The States must monitor the performance of each subgroup separately. For example, under ESEA, schools and districts must review results on annual tests both by the student population as a whole and by various "subgroups" of students, including students with disabilities. *Id.* § 6311(b)(2)(B)(xi).

Statewide accountability systems must be based on "academic content standards" that specify what students should know and be able to do. *Id.* § 6311(b); 34 C.F.R. § 200.1(b)(1)(i). States must also adopt "academic achievement standards" that are aligned with the content standards. 20 U.S.C. § 6311(b); 34 C.F.R. § 200.1(c)(1)(i). Tests must be aligned to those "challenging academic content standards and challenging student academic achievement standards," and those standards must apply to *all* schools and *all* children. 20 U.S.C. § 6311(b)(2)(B)(i).

The ESEA mandate for annual assessments that are aligned to challenging academic expectations grew out of the standards-based reform movement that took

hold in the 1980s and 1990s.[3] In 1994, that movement led to significant revision of the ESEA by the Improving America's Schools Act (IASA), Pub. L. No. 103-382, 108 Stat. 3518 (1994). The IASA's statement of purpose noted the "particularly great" needs of "children in our Nation's highest-poverty schools, children with limited English proficiency, children of migrant workers, children with disabilities, Indian children, children who are neglected or delinquent, and young children and their parents who are in need of family-literacy services." *Id.* § 1001(b)(3). All children, Congress declared, can master challenging content. *Id.* § 1001(c)(1). IASA therefore required math and language arts standards to be used as accountability measures in state tests. *Id.* § 1111(3).

The standards-based reform movement made its most visible mark with the 2001 reauthorization of ESEA, also known as the No Child Left Behind Act (NCLB), Pub. L. No. 107-110, 115 Stat. 1425 (2002).[4] As this Court noted in *Horne v. Flores*, NCLB sought to "raise the level of education nationwide" by, among

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[3] *See, e.g.*, Natalie Gomez-Velez, *Public School Governance and Democracy: Does Public Participation Matter?* 53 VILL. L. REV. 297, 306 (2008).

[4] *See* Lauren B. Resnick et al., *Standards-Based Reform: A Powerful Idea Unmoored, in Improving on No Child Left Behind* 103 (Richard D. Kahlenberg ed., 2008) ("No Child Left Behind is the current expression of a twenty-year drive to use a 'standards strategy' to steer American education toward higher levels of achievement and greater equity."); *see also Broken Systems, Broken Duties: A New Theory For School Finance Litigation*, 94 MARQ. L. REV. 1195, 1197 (Summer 2001) (NCLB "brought the concept of standards-based reform to center stage").

other things, "requiring States receiving federal funds to define performance standards and to make regular assessments of progress toward the attainment of those standards." 557 U.S. 433, 461 (2009). No longer could tepid expectations or poor progress for any subgroup be obscured by school-wide or district-wide averages. Instead, SEAs like the Department were tasked with reviewing disaggregated data to ensure that each subgroup is progressing towards proficiency. Pub. L. No. 107-110 § 1111(h)(1)(C). NCLB's original goal was that all students—including those in the various subgroups—would achieve proficiency by 2013-14, although that ambitious target was subsequently revised.[5]

ESEA thus evolved to function as a comprehensive, national, integrated school improvement system. When a State submits its Plan in exchange for ESEA funding, that Plan must coordinate the expectations of approximately a dozen federal statutes, including IDEA. 20 U.S.C. § 6311(a)(1)(B).[6] Under the changes

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[5] When it became clear that an overwhelming majority of school districts were not going to meet this goal, the United States Department of Education began to waive it in exchange for states agreeing to certain conditions. *See* Derek W. Black, *Federalizing Education by Waiver?* 68 VAND. L. REV. 607, 613–14 (2015).

[6] Other programs that must be coordinated in a State plan include: the Rehabilitation Act of 1973 (20 U.S.C. §§ 701 *et seq.*), the Carl D. Perkins Career and Technical Education Act of 2006 (20 U.S.C. §§ 2301 *et seq.*), the Workforce Innovation and Opportunity Act (29 U.S.C. §§ 3101 *et seq.*), the Head Start Act (42 U.S.C. §§ 9831 *et seq.*), the Child Care and Development Block Grant Act of 1990 (42 U.S.C. §§ 9858 *et seq.*), the Education Sciences Reform Act of 2002 (20 U.S.C. §§ 9501 *et seq.*), the Education Technical Assistance Act

implemented through NCLB and successive legislation, federally funded educational programs are thus intended to raise the bar for *all* students and subgroups. The details of the process, however, are entrusted to the States.

Background and implementation of the IDEA. In contrast to ESEA's systemic focus, the primary goal of the IDEA is to provide a FAPE to individual students with disabilities. As this Court noted in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, at the time the Act was adopted, Congress found that nearly one million students with disabilities were excluded from public school outright, while over half of the nation's disabled students were "receiving an inappropriate education." 458 U.S. 176, 189 (1982) (citing 89 Stat. 774, note following § 1401). Thus, at its inception, IDEA was designed to provide access to the schoolhouse for students who were excluded outright, along with a basic floor of educational opportunity. *Id.* at 198–200. This access was then to be made meaningful through "specially designed instruction" and associated services. *Id.* at 201; *see also* 20 U.S.C. § 1401. The centerpiece of the IDEA's promise of a FAPE to students with disabilities is the IEP.

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of 2002 (20 U.S.C. §§ 9601 *et. seq.*), the National Assessment of Educational Progress Authorization Act (20 U.S.C. §§ 9621 *et seq.*), the McKinney-Vento Homeless Assistance Act (42 U.S.C. §§ 11301 *et seq.*), and the Adult Education and Family Literacy Act (29 U.S.C. §§ 3271 *et seq.*).

Prior to 1990, IDEA (then the Education of the Handicapped Act)[7] emphasized the right of individual students to educational access and appropriate services through an IEP. *See* Pub. L. No. 94-142 §3(c), 89 Stat. 773 ("It is the purpose of this Act to assure that all handicapped children have available to them within the time periods specified in section 612(2)(B), a free appropriate education which emphasizes special education and related services defined to meet their unique needs."). The 1975 Act mandated a written IEP for all disabled students with specific content requirements. It likewise obligated SEAs to establish "guaranteed procedural safeguards," including a complaint process and hearing rights. *Id.* § 615.

Subsequent amendments to IDEA not only expanded IEP requirements for individual students, but also added elements of standards-based reform and data-driven accountability. Many of those changes mirror the evolution of the ESEA's expectations for State Plans. In 1997, for example, Congress found that IDEA implementation had "been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities." IDEA Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997). This language echoed Congressional findings in the 1994 ESEA reauthorization: "Research clearly shows that children, including low achieving children,

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[7] The Education of All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773, was adopted in 1975. It was reauthorized in 1990, at which time it was renamed the Individuals with Disabilities Education Act. *See* Pub. L. No. 101-476, 104 Stat. 1142.

can succeed when expectations are high and all children are given the opportunity to learn challenging material." Improving America's Schools Act of 1994, Pub. L. No. 103-382 §1001, 108 Stat. 3518 (1994).

Building on the groundwork of IASA, the 1997 IDEA revisions added a requirement of performance goals and indicators, and required that students with disabilities be included in state assessments. IDEA Amendments of 1997, Pub. L. No. 105-17, 111 Stat. 37 (1997); *see also Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 240 (2007) (stating that the 1997 amendments were "intended to place greater emphasis on improving student performance") (quoting S. Rep. No. 105-17, at 5 (1997)).

The 2004 IDEA amendments again included both provisions designed to benefit individual students as well as revisions aligned with NCLB accountability. For individual students, among other things the 2004 amendments expanded the requirements for transition services.[8] To drive systemic change, IDEA 2004 provided for enhanced State efforts on "improving educational results and functional outcomes for all children with disabilities" and gave the United States Department of Education more enforcement options. Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 616, 118 Stat.

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[8] Under IDEA 2004, the first IEP created after the child is sixteen must include post-secondary goals based on age-appropriate transition assessments and should identify the services the student needs to reach those goals. Individuals with Disabilities Education Improvement Act of 2004, 108 Pub. L. No. 446, 113 Stat. 2647 (2004) ("IDEA 2004").

2734–36 (2004). States receiving IDEA funds submit State Performance Plans (SPPs) to the United States Department of Education's Office of Special Education Programs (OSEP). 20 U.S.C. § 1416(b)(1)(A).

In July 2013, OSEP announced a change in which the SPP model would integrate outcomes data into the compliance monitoring that was the hallmark of SPP reporting. Starting in 2013-14, districts and BOCES[9] would receive both compliance scores (based on IDEA procedural compliance data) and outcome scores (based on assessment results). This system of "Results Driven Accountability" would include, for example, scores reflecting the percentage of students with disabilities who score at a basic level or above on the National Assessment of Educational Progress. The SPP must also include a State Systemic Improvement Plan (SSIP) that is specifically focused on improving achievement outcomes for students with disabilities.[10] Like ESEA,

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[9] Generally, primary responsibility for providing educational services to students with disabilities is entrusted to school districts, which function as Local Education Agencies under federal law. However, some smaller Colorado school districts have joined to create boards of cooperative education services (BOCES) that oversee and implement special education programs. Colorado uses the term "Administrative Unit" to refer to the legal entity (school district, BOCES, or state Charter School Institute) that bears fiscal and administrative responsibility for special education services. COLO. REV. STAT. §§22-20-103(1), 106(1).

[10] Colorado submitted its SSIP to the United States Department of Education in April of 2015. *See* Colo. Dep't of Educ., State Systemic Improvement Plan Phase 1 (April 1, 2015), http://tinyurl.com/hdnb9o6; *see also* Colo. Dep't of Educ., State Systemic Improvement Plan Phase 2 (April 1, 2016), http://tinyurl.com/zvrc87x.

IDEA thus now specifies certain requirements designed to drive systemic improvement at the State level.

In contrast to the substantial changes in data reporting, in the years since this Court decided *Rowley*, the statute's FAPE definition remains untouched, although Congress has expanded some procedural and substantive IEP requirements. *See, e.g.*, Resp. Br. 5. The evolution of IDEA thus reflects more than ever "the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Rowley*, 458 U.S. at 206.

SUMMARY OF ARGUMENT

In an attempted end-run around *stare decisis*, Petitioner incorrectly suggests that the IDEA's definition of a FAPE was implicitly modified by the federal trend towards standards-based accountability. Petitioner blurs the lines between two distinct statutory functions by suggesting that amendments to ESEA altered the judicial review standard for individual FAPE claims under IDEA. There is a process to hold schools and districts responsible for failure to meet the expectations of standards-aligned accountability, but it is not through individual student IDEA litigation. Moreover, because IDEA is a funding statute, its conditions must be expressed unambiguously. The legislative history of amendments to ESEA and IDEA is now, just as it was in 1982, "too thin a reed on which to base an interpretation of the Act." *Id.* at 204 n.29.

Petitioner suggests that without judicial intervention, students with disabilities in Colorado and elsewhere in the Tenth Circuit will receive a lesser education than those in other places. Petitioner's charge ignores that the content of academic standards is entrusted to the States, and Colorado has adopted ambitious and comprehensive standards that are entitled to deference.

Petitioner and the Federal Government seek to revise this Court's requirement that an IEP be developed in accordance with the IDEA's procedural requirements and be "reasonably calculated to enable the child to receive educational benefits," *Id.* at 207, by inserting various adjectives. Neither proposal will fundamentally change the IEP process and content requirements, but each adds an ambiguity to IEP scrutiny that leaves the process fundamentally unworkable. Moreover, Petitioner's hindsight focus on educational outcomes to assess IEP sufficiency is misplaced. Determining whether an IEP is "reasonably calculated" is an *ex ante* judgment, not an *ex post* exercise. The *Rowley* standard should remain intact.

ARGUMENT

I. IDEA is part of a body of education funding statutes that work in concert, that can only impose duties unambiguously, and that entrust the details of implementation to the States.

A. The IDEA must be understood within the larger context of federal education policy.

The ESEA forms the core of federal education policy, but Congress has also passed a number of laws targeting student populations with particularized needs. Some of those laws have been incorporated directly into ESEA—for example, the 1968 Bilingual Education Act became Title VII of ESEA. Pub. L. No. 90-247 §§ 701–07, 81 Stat. 783 (1968). Other statutes are codified separately. In 1975, Congress adopted the Education for All Handicapped Children Act, Pub. L. No. 94-142, 89 Stat. 773 (1975), which later became the IDEA, Pub. L. No. 101-476, 104 Stat. 1103 (1990). Subtitle B of 1987's Stewart B. McKinney Homeless Assistance Act targets educational programming for homeless children. *See* Pub. L. No. 100-77, §§ 721–25, 101 Stat. 482, 525–28 (1987) (codified at 42 U.S.C. § 11431–35). State Educational Agencies like the Department must develop a State Plan that "coordinate[s]" the mandates of a number of federal statutes, including the IDEA. *See* 20 U.S.C. § 6311(a)(1)(B).

Petitioner cites the 2004 amendments to the IDEA as evidence for the claim that school district obligations to students with disabilities are different than they

were at the time this Court decided *Rowley*. Pet. Br. 39. This misunderstands the paradigm shift of NCLB.

Students with disabilities were but one of a number of subgroups who were underperforming (that is, "left behind") at the time NCLB was enacted and who Congress intended to assist. For example, English language learners were targeted by NCLB provisions that added the English Language Acquisition, Language Enhancement, and Academic Achievement Act to Title III of the ESEA. Pub. L. No. 107-110, §§ 3101–11, 115 Stat. 1425, 1609 (2002) (codified at 20 U.S.C. §§ 6811–94). Those provisions required States to ensure that such students "attain English proficiency, develop high levels of academic attainment in English, and meet the same challenging State academic content and student academic achievement standards as all children are expected to meet." 20 U.S.C. § 6812(1) (2002). Other provisions likewise targeted "children and youth in local, tribal, and State institutions for neglected or delinquent children and youth" so that those students would "have the opportunity to meet the same challenging State academic standards" as their peers. Pub. L. No. 107-110, § 1401(a)(1), 115 Stat. 1425 (2002) (codified at 20 U.S.C. § 6421(a)(1)). Similar language was added regarding education for homeless children. *Id.* § 721 (requiring that State plans describe how homeless children "will be given the opportunity to meet the same challenging state academic standards all students are expected to meet").

Contrary to Petitioner's argument, the notion that the NCLB's standards-based accountability implicitly amended IDEA in ways not specified by Congress is untenable. NCLB raised standards, but the idea that

high standards and data-driven accountability mean something different for students with disabilities than for other subgroups cannot be reconciled with the letter or spirit of ESEA.

B. Courts cannot infer an amendment to IDEA; Congress must speak unambiguously.

IDEA is a funding statute rooted in "cooperative federalism." *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49, 52 (2005). It leaves to the States "the primary responsibility for developing and executing educational programs" for disabled students, although it "imposes significant requirements to be followed in the discharge of that responsibility." *Rowley*, 458 U.S. at 183. Because it is a funding statute, the Act cannot "impose [a] burden upon the States unless [Congress] does so unambiguously." *Id.* at 190 n.11.

Congress has not done so as to the IDEA. That statute defines a FAPE as "special education and related services that (A) have been provided at public expense under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under [20 U.S.C. § 1414(d)]." 20 U.S.C. § 1401(9). As this Court noted in *Rowley*, the definition functions "[a]lmost as a checklist for adequacy under the Act." 458 U.S. at 189.

That "checklist" has never been amended. This Court held in *Rowley* that any substantive standard describing the level of education required for disabled students was "[n]oticeably absent" from the statute. *Id.* Congress was presumed to be aware of this holding when it reauthorized and amended IDEA in 1997 and 2004. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."). Absent clear action by Congress, there is no basis for reading new terms into the statute.

Although Petitioner contends that post-*Rowley* amendments to IDEA gave rise to a substantive standard that did not exist when that case was decided, he cites no specific Congressional action in support of the argument. Rather, he suggests that an enhanced level of "educational benefits" is *implied* by the infusion of standards-based reform into ESEA. Pet. Br. 26–29. Such an implication—even if it existed—is insufficient under a federal funding statute. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (holding that IDEA did not "furnish[ ] clear notice" that one of the obligations of the Act "is the obligation to compensate prevailing parents for expert fees"); *Rowley*, 458 U.S. at 204 n.26.

This case thus meaningfully differs from *West v. Gibson*, 527 U.S. 212 (1999), which Petitioner cites for the proposition that amendments to 42 U.S.C. § 1981 implicitly gave the EEOC authority to award compensatory damages as an "appropriate" remedy under Title VII of the Civil Rights Act of 1964. Pet. Br.

35. Title VII is not a funding statute, but was adopted under Congress' Commerce Clause authority. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (concluding that the Commerce Clause provides Congress with authority to enact provisions of the Civil Rights Act of 1964). *Gibson* thus is of no relevance where Congress' exercise of authority is under the Spending Clause. *Cf. Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16–18 (1981) (explaining the difference between a civil rights statute enacted under § 5 of the Fourteenth Amendment and one reflecting the terms of a "contract" for the receipt of funds).

Nor can the Petitioner or the Federal Government properly find an implied amendment in carefully selected statements from legislative history. *See, e.g.*, Pet. Br. 28–29; U.S. Amicus Br. 21–23. Just as such statements were "too thin a reed on which to base interpretation of the Act" in 1982, *Rowley*, 458 U.S. at 204 n.26, they are insufficient here. Congress' clear choice to leave the statutory definition of a FAPE untouched speaks louder than the aspirational remarks of individual legislators.

C. Educational standards-setting is entrusted to State governments and managed through accountability systems, not lawsuits.

It is axiomatic that the details of educational policy are reserved to State governments under the Tenth Amendment, and public education is a state and local function, even when partially funded using federal funds that impose general conditions. The Federal Government contends that absent court intervention, Colorado school districts will essentially be "told that it is perfectly fine to aim low." U.S. Amicus Br. 36. But

it is the States, not Congress or the courts, that develop and implement specific standards. As this Court noted in *Rowley*, "Congress' intention was not that the Act displace the primacy of States in the field of education but that States receive funds to assist them in extending their educational systems to the handicapped." *Rowley*, 458 U.S. at 208.

Nor is there any evidence that Colorado or its school districts have "aimed low." *See* COLO. REV. STAT. § 22-7-1005 (requiring the Colorado Board of Education to "[e]nsure that [Colorado's] standards are comparable in scope, relevance, and rigor to the highest national and international standards that have been implemented successfully"). Likewise, the States supporting Petitioner as *amici* can set whatever standard they choose so long as it exceeds the floor set by federal law.

Throughout the evolution of standards-based education reform, Congress has expressed its conviction that state and local autonomy is an essential component of raising the bar for all student subgroups. The IASA, for example, declares that "[d]ecentralized decisionmaking is a key ingredient of systemic reform. Schools need the resources, flexibility, and authority to design and implement effective strategies for bringing their children to high levels of performance." Pub. L. No. 103-382 § 1001(c)(8).

This Court emphasized the same principle with regard to NCLB in *Horne v. Flores*:

> NCLB marked a dramatic shift in federal education policy. It reflects Congress' judgment that the best way to raise the level of education nationwide is by granting state and local

> officials flexibility to develop and implement educational programs that address local needs, while holding them accountable for the results. NCLB implements this approach by requiring States receiving federal funds to define performance standards and to make regular assessments of progress toward the attainment of those standards.

557 U.S. at 461. And expanded local autonomy is the calling card of amendments reflected in 2015's Every Student Succeeds Act (ESSA), Pub. L. No. 114-95, § 1111, 129 Stat. 1802 (2015).[11]

The conditions expressed by Congress in its various enactments emphasize IDEA's core purpose as an educational access statute, setting a floor of opportunity for a population with a history of exclusion from public education. Congressional expressions of intent regarding the use of federal funds—under IDEA, NCLB, and ESSA—reaffirm a commitment to state and local flexibility. The States should be trusted to fulfill the role that Congress has given them.

And Colorado has proven worthy of that trust. Colorado's commitment to high expectations for all students is not dependent on the legal standard for

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[11] *See* Kimberly Jenkins Robinson, *No Quick Fix for Equity and Excellence: The Virtues of Incremental Shifts in Education Federalism*, 27 STAN. L. & POL'Y REV. 201, 242 (2016) ("ESSA represents a backlash against the substantial expansion of the federal role in education."); *see also* Jessica Bulman-Pozen, *Executive Federalism Comes To America*, 102 VA. L. REV. 953, 990 (June 2016) (stating that the ESSA "curbs federal executive supervision of state education policy going forward").

reviewing IEPs; rather, it is based on sound accountability systems designed to raise the bar for all student subgroups. To implement the goals of the ESEA and NCLB, SEAs like the Colorado Department of Education implement an accountability system that "grades" school districts and individual schools based on multiple metrics. The primary metric is academic achievement (both for all students and for each subgroup), as measured by proficiency on the annual assessment. Accountability systems also evaluate indicators such as high school graduation rates and the percentage of English language learners making progress in English proficiency. 20 U.S.C. § 6311(c)(4).[12] The State accountability system enables meaningful differentiation between schools "for all students and subgroups of students" and enables identification of any school "in which any subgroup of students is consistently underperforming." *Id.* § (c)(4)(C)(iii). It is through this accountability monitoring—not through individual student litigation—that States like Colorado ensure that schools and districts are raising the floor of educational opportunity for all subgroups, including students with disabilities. If students with disabilities are failing to achieve academically, this accountability process is designed to identify it.

If a State fails to comply with the ESEA's accountability requirements, the U.S. Department of Education has a range of enforcement options available to it. These include issuing a cease and desist order, 20

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[12] Amendments under the ESSA revised state accountability requirements in a number of respects, but left untouched the core mandates of high standards, regular assessments, and state-monitored accountability.

U.S.C. § 1234e, entering into a compliance agreement with the SEA, *id.* § 1234f, and suspending or withholding all or a portion of the State's Title I, Part A programmatic funds, *id.* § 1234d. The States have similar enforcement authority, including the ability to withhold a district's Title I, Part A funds. *See, e.g., id.* § 1232c.

Specific to disabled students, the Department analyzes data disaggregated in a variety of ways, including by disability, by site, and even by grade, so that it can identify schools or districts in need of technical assistance. The Department provides guidance to schools in aligning IEPs with state academic content standards.[13] It is through this process that the State ensures that schools assist students with disabilities—and other student subgroups—to reach the high standards adopted under NCLB. Rather than promoting this goal, individual student litigation such as that proposed by Petitioner diverts scarce resources and places critical education policy decisions in the hands of judges instead of educators.

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[13] *See, e.g.*, Colo. Dep't of Educ., *Writing Standards-aligned Advanced Learning Plans (ALPs) and Individualized Education Programs (IEPs): A Supplemental Guidance Document for Designing Effective Formal Educational Plans* (Sept. 2014; Updated March 2016), http://tinyurl.com/hrdjxk7.

II. Petitioner and the Federal Government propose a standard that will impede collaboration between schools and families and that is fundamentally unworkable.

As other *amici* have noted, setting high expectations for students with disabilities has been determined to be in the best interests of students and communities, and is standard practice in 21st century education. *See* Nat'l Ass'n of State Dirs. Of Special Educ. *Amicus* Br. 6–7. But the question in this case is whether a specific *additional* obligation should be judicially grafted onto the IDEA; specifically, one that invites reviewing judges to second-guess educators using ambiguous terms. Because the proposed standard would interfere with collaboration between schools and families, and is unworkable, the Court should decline to add such a threshold.

A. The proposed standard of review threatens the school and family collaboration that is the hallmark of IEP development.

The IEP development process is designed to be a collaborative effort between schools and families. In *Schaffer v. Weast*, this Court cited the "cooperative process that [IDEA] establishes between parents and schools" as the "core of the statute." 546 U.S. at 53. Parents play a "significant role" in the process and function as formal members of the IEP team. *Id.* (citing 20 U.S.C. § 1414(d)(1)(B)). The cooperative process ends when parents pursue judicial intervention, and a precipitous trip to the courthouse "run[s] counter to Congress' view that the needs of handicapped children are best accommodated by having the parents and the local educational agency work together to formulate an

individualized plan for each handicapped child's education." *Smith v. Robinson*, 468 U.S. 992, 1012 (1984).

The legal framework for resolving special education disputes repeatedly emphasizes communication and consensus over litigation. SEAs like the Department must offer mediation services and have a complaints process. 20 U.S.C. § 1415(b)(5)–(6). The 2004 amendments to IDEA require districts to respond to parent complaints by providing a written description of the reasoning, options considered, and factors used in reaching an IEP decision. *Id.* § 1415(c)(2)(B)(i)(I). If a dispute thereafter develops, Congress has directed that any due process complaint notice must contain "a description of the nature of the problem" and "a proposed resolution of the problem to the extent known and available." *Id.* § 1415(b)(7)(A)(ii)(IV). Colorado's due process rules require that within fifteen days of receiving a parent's due process complaint, the Administrative Unit must convene a resolution meeting between parents and appropriate members of the IEP team. *See* Colo. Dep't of Educ., *State Level Complaint Procedures* at 2, http://tinyurl.com/hp4ze9g. "The purpose of the resolution meeting is for the parent of the child to discuss" the complaint so that the Administrative Unit can try to resolve it. 1 CODE COLO. REGS. § 301-8(7.5)(d)(1)(B).

Adjusting the standard as Petitioner and the Federal Government propose is unlikely to assist students but will most certainly increase litigation and discourage the family-school cooperation that is at the heart of the IDEA. A nebulous, aspirational articulation of a legal standard—especially one not

rooted in the language of the statute—invites families to believe that there are somehow greater remedial prospects at the courthouse than within the education system, and thereby discourages cooperation and collaboration.

B. The proposed standard is unworkable.

Colorado has nearly 900,000 public school students, approximately ten percent of whom are receiving special education services.[14] The suggestion that courts should judge the sufficiency of those students' IEPs based on nebulous modifiers and on an after-the-fact review of educational outcomes, rather than adherence to IDEA's statutory requirements, risks an increase in litigation and a breakdown in the collaborative process that is the hallmark of IDEA. Likewise, the legal standard suggested by the Petitioner would impair the ability of SEAs like the Department to resolve disputes at the mediation, state complaint, or due process hearing level.

1. The proposed standard is ambiguous.

The notion that an "appropriate" education for students with disabilities is one that provides "substantially equal opportunities to achieve academic success, attain self-sufficiency, and contribute to society," Pet. Br. 40, is laudable in purpose, yet unworkable as a legal standard. It would invite courts to "impos[e] their view of preferable educational

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[14] *See* Colo. Dep't. of Educ., *Colorado Education Facts and Figures* (Oct. 2016), http://tinyurl.com/hv3ag3n; Colo. Dep't. of Educ., *Students with Disabilities Birth-21* (2015), http://tinyurl.com/zpl8les.

methods" upon the States, in direct contravention of the principles articulated in *Rowley*. 458 U.S. at 207. Any proposed "heightened standard" for IEP development, without specific grounding in IDEA's tangible expectations, risks confusing those educators who work to develop IEPs every day. Worse still, it invites an explosion in special education litigation as lawyers and judges wrestle to define the boundaries of a judicially crafted statutory change.

Colorado has responsibilities to all students, including a variety of populations that have struggled to achieve. In fact, IDEA is not the only statute in which the State is tasked with providing a FAPE to an at-risk student subgroup. In the Stewart B. McKinney Homeless Assistance Act, Congress mandated that a FAPE be provided to homeless children:

> Each state educational agency shall ensure that each child of a homeless individual and each homeless youth has access to the same *free, appropriate public education*, including a public preschool education, as provided to other children and youths.

Pub. L. No. 100-77, § 721, 81 Stat. 783 (1987) (codified as amended at 42 U.S.C. § 11431) (emphasis added).

Unlike IDEA, the McKinney-Vento Act[15] does not provide a checklist definition of the term "free, appropriate public education." It also does not contain

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[15] The Act's name changed with a 2000 reauthorization. *See* McKinney-Vento Homeless Assistance Act, Pub. L. No. 106-400, 114 Stat. 1675 (2000).

an IEP process and related procedural safeguards, so that courts have not been called upon to interpret the term. In Colorado, the Board and the Department are responsible for creating State Plans that incorporate compliance with both IDEA and McKinney-Vento. Although the statutes are vastly different, the State of Colorado cannot administer them in such a way that suggests that the assurance of a FAPE for students with disabilities confers something greater than does a FAPE guarantee for a homeless student. In fact, if the Court changes the FAPE standard under IDEA, it risks upending the balance that Colorado has struck trying to meet the needs of all students.

Petitioner suggests that student expectations are exclusively defined by the legal standard for judicial review. Absent correction, he asserts, the IEPs of students with disabilities who live in the Tenth Circuit will be out of sync with ESEA's high expectations for all student groups. *See, e.g.*, Pet. Br. 29 ("The Tenth Circuit's adherence to the just-above-trivial standard runs headlong into the IDEA's and ESEA's demands for academic accountability and achievement."). Not so. Unlike the *Rowley* standard, which is based on the IDEA's text, neither Petitioner's nor the Federal Government's proposed standard derives from the statute—they would instead be entirely judicial creations. *See* Resp. Br. 49–51. Rather than a standard applied when teachers, specialists, and families join together to develop an IEP, Petitioner seeks to import from the outset the standard of review that a judge applies when the cooperative process of IEP development has already failed, when well-intentioned

families and caring educators have intractably locked horns. This Court should reject that invitation.

The revised standards of review proposed by the Petitioner and the Federal Government insert a level of ambiguity and subjectivity into the review of an IEP that will create uncertainty and invite litigation. Through its dispute resolution program, the Department can evaluate an IEP to see, for example, if it articulates challenging yet attainable goals and reflects a research-based pedagogy and individual services reasonably calculated to allow a student to "advance appropriately towards attaining [those goals]." *See* 20 U.S.C. § 1414(d)(1)(A)(i). It is far less likely that the Department can mediate a dispute as to whether an IEP "aims" to provide "substantially equal" opportunities," Pet. Br. 40 or "provides the child an opportunity to make significant progress in light of his capabilities," U.S. Amicus Br. 17.

Effective administration of the IDEA requires that the Department operate under an objective standard. Petitioner's proffered change in the baseline set by *Rowley* raises the substantial risk that an IEP that is fully compliant with IDEA's content requirements and "reasonably calculated" at its inception would nonetheless be labeled infirm upon judicial review—based on a subjective standard disconnected from the statute's plain language. An ambiguous review standard thus reinforces the notion that there may be something to be gained under a subjective standard applied at the courthouse that is not available from educators.

2. The legal sufficiency of an IEP should not be judged in hindsight based on outcomes.

Petitioner and the Federal Government invite judges to Monday-morning quarterback[16] the quality of an IEP based on the student's academic outcome, rather than on whether there was faithful adherence to a process that this Court recognized will "in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Rowley*, 458 U.S. at 206. Yet whether an IEP is "reasonably calculated" to provide educational benefit is an assessment that must be made at the time the IEP is created, based on the information available to the district at that time. Year-end achievement data for a particular student no more determines the adequacy of that year's IEP than does a surgical outcome determine whether an operating physician met the standard of care. And educational growth is a product of myriad factors, only some of which can be controlled or adjusted through an IEP.

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[16] Although Petitioner claims to recognize that the obligation to provide a FAPE is "not guaranteed to produce any particular outcome," Pet. Br. 49, it is *precisely* because the student in this case did not progress much that the sufficiency of his IEP is under attack. *Id.* at 34. Petitioner's *amici* States likewise misstate the standard, asserting that an IEP is judged by what it "confers," not by what it is "reasonably calculated" to confer. *See also* Del., Mass., & N.M. Amicus Br. 3–4 (complaining that if the *Rowley* standard "requires only more than *de minimis* ***progress*** ... then as a nation we have not [addressed Congress' purpose in adopting IDEA]") (emphasis added).

This Court's review of the Equal Education Opportunities Act requirement that a State take "appropriate action" to overcome language barriers is instructive. In *Horne v. Flores*, this Court held that "subpar performance" was not enough to suggest that the State of Arizona had failed to take "appropriate action." 557 U.S. at 468 (holding that appropriate action "does not require the equalization of results between native and non-native speakers on tests administered only in English"). Likewise here, an after-the-fact review of educational outcome cannot dictate sufficiency of the IEP process.

For over 30 years, Congress has defined the education system's obligations to students with disabilities in terms of carefully crafted procedural and substantive requirements. Those provisions ensure that each student with disabilities is considered individually to ensure that the right goals are set and services arranged to allow that student to have the same chance to succeed as his peers. But even the best educational judgments can miss the mark, so the IDEA likewise requires that the school revisit the IEP at least annually. 20 U.S.C. § 1414(d)(4)(A). This cycle—plan, implement, assess, and revise—happens at a macro level through the ESEA State Plan and at a micro level in millions of IEP meetings all over the country. It is an iterative, collaborative process between schools and families.

The IEP team must review the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved. The team must consider:

- Any lack of expected progress toward the annual goals and in the general education curriculum, if appropriate;
- The results of any reevaluation;
- Information about the child provided to, or by, the parents; and
- The child's anticipated needs.

Id. That an IEP produces sub-optimal progress does not suggest that IDEA was violated,[17] but simply means that the annual review process will have to do its work.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

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[17] Although this Court has not been called upon to directly address the question, the Circuit Courts uniformly recognize that the appropriateness of an IEP is judged prospectively, not retrospectively. *See, e.g., Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990) ("An IEP is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated."); *K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 808 (8th Cir. 2010) (same); *see also Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999) ("[W]e examine the adequacy of [the IEPs] at the time the plans were drafted."); *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 530 (3d Cir. 1995) (holding that an IEP must be judged prospectively from the time of its drafting); *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 185–86 (2d Cir. 2012) (same). This "at the time of drafting" approach is also consistent with this Court's expectation that an IEP be *reasonably calculated*.

Respectfully submitted,

CYNTHIA H. COFFMAN
Attorney General

FREDERICK R. YARGER
Solicitor General
Counsel of Record

GLENN E. ROPER
Deputy Solicitor General

JULIE C. TOLLESON
First Assistant Attorney General

Office of the Colorado Attorney General
1300 Broadway
10th Floor
Denver, Colorado 80203
Fred.Yarger@coag.gov
(720) 508-6186

Counsel for Amici Curiae Colorado State Board of Education and Colorado Department of Education

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